In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-581

JOSEPH CIVITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his written statement was improperly admitted, that the evidence is insufficient to sustain his conviction, and that the jury instructions were erroneous.

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts charging that he aided and abetted Robert Nesto unlawfully to purchase twelve firearms, in violation of 18 U.S.C. 2 and

922(a)(6), and unlawfully to deal in firearms, in violation of 18 U.S.C. 2 and 922(a)(1).[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).[2]

The evidence at trial showed that petitioner, a former policeman with the Randolph Massachusetts Police Department, obtained a Massachusetts Firearms Identification card and a pistol permit which another policeman had stolen from the Department (IIB-Tr. 2, 6, 53-55).[3] Petitioner gave both documents to co-defendant Nesto who, under an alias, used them to purchase a dozen guns and rifles (I-Tr. 127, 145; IIA-Tr. 158), several of which he subsequently sold in three separate transactions (I-Tr. 116; IIA-Tr. 78-81).

When petitioner was arrested he signed a card acknowledging that he had been advised of his rights and told the arresting agents (I-Tr. 67), "I know all that stuff. I am a police officer. Don't give me that." Petitioner then signed a statement (Pet. App. 13-

---

[1] Nesto pleaded guilty to thirteen counts charging that he made false statements and used false identification to purchase guns and that he had unlawfully dealt in firearms. He did not testify at trial.

[2] The judgment of the court of appeals was entered on July 9, 1975 (Pet. App. B). On August 11, 1975, Mr. Justice Brennan granted petitioner's request for an extension of time in which to file a petition for a writ of certiorari to and including September 5, 1975. The petition was not filed until October 16, 1975, however, and is therefore substantially out of time under Rule 22 of this Court's Rules.

[3] "Tr." refers to the three-volume transcript of trial proceedings.

14) that he had given the stolen identification card and permit to Nesto, that he had told Nesto "to destroy them when he was through," and that "if he got caught it was his problem." The statement was admitted after a hearing on its voluntariness (I-Tr. 65-105).

1. Petitioner's contention that his statement was improperly admitted because he allegedly did not knowingly and intelligently waive his rights is refuted by the circumstances at the time of and immediately following his arrest. As the court of appeals observed (Pet. App. 8):

> During the voir dire, Civita's own counsel conceded the adequacy of the "Miranda" warnings that were given. It was brought out that Civita was permitted, after arrest, to call his lawyer, and that he had decided, against the lawyer's advice, to give a statement, which he signed after executing a written waiver of his rights. Civita had himself been a policeman from 1969 to 1973.[4]

2. Petitioner's claim that the evidence was insufficient to support his conviction is without merit. There was no dispute that Nesto had committed the crimes charged or that petitioner had provided Nesto with the stolen documents. On the question of intent, the court of appeals noted (Pet. App. 10-11) that

---

[4] In the court of appeals, petitioner also argued that the statement was preceded by threats and inducements. In deciding the issue against petitioner, the court relied upon the trial judge's resolution of a credibility conflict in favor of the arresting agent (Pet. App. 8-9), and petitioner suggests no reason why this resolution was incorrect.

those portions of petitioner's statement in which he attempted to disavow knowledge of Nesto's plans—that he had instructed Nesto to destroy the documents after he had used them and that he had told Nesto that "if he got caught it was his problem"—supported a permissible inference by the jury that petitioner knew that he was facilitating the illegal purchase of firearms when he gave Nesto the stolen papers. As the court of appeals noted (Pet. App. 11):

> [I]llegal dealing was a natural, probable and foreseeable consequence of providing the permit. The permit was a basic and essential device for thwarting [firearms] regulation; Civita should not be heard to complain that he was ignorant of an entirely foreseeable consequence attendant upon its use.

3. With respect to the district court's charge, petitioner says first (Pet. 5) that the court failed to instruct the jury about the meaning of the terms "willfully and knowingly." It is true that the court did not elaborate on these terms in its initial charge, but at the request of defense counsel a supplemental charge (to which no objection was made) fully explaining these terms was given before the jury retired (III-Tr. 141-142).

Petitioner's final challenge to the court's charge is that it improperly instructed on the issue of intent. This claim was correctly answered by the court of appeals, on whose opinion we rely (Pet. App. 11-12):

> Appellant's remaining objections to the instructions seem to be that the court's statement

prejudiced the jury, by indicating that the sole reasonable inference to be drawn from providing a pistol permit is the intention to enable someone to buy a gun. It is true that the court, in explaining how it may be inferred that a person intends the natural and probable consequences of his acts, presented the example of lighting a firecracker, with the intention that it explode. The court stated that the jury could infer "that the purpose of a pistol permit and its sole official purpose is to enable someone to buy a pistol." But the court also added that lighting a firecracker was a "simple example", and after each statement on what might be inferred the court made it clear to the jury that it need not infer that appellant intended the crimes charged but rather could believe that appellant intended the permit to be used for another purpose other than the buying of guns or dealing in them. Moreover, after the court's initial instructions and appellant's objections were made, the court in further instructions clarified the firecracker analogy, saying "That was only offered to you in a very summary way as a means of trying to describe what I was talking about by natural and probable consequences and is not intended to be descriptive of the circumstances of this case." Viewing the instructions as a whole we think the issue of intent was properly preserved for the jury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599290 166